DATE FILED: March 19, 2024 5:01 PM

SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to C.R.S. §1-40-107(2),(2023) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for the Proposed Initiative 2023-2024 #142 ("Parental Notification of Gender Incongruence") **Petitioner:** Mary Elizabeth Childs, **v.** **Respondents:** Lori Gimelshteyn and Erin Lee and **Title Board:** T. Conley, J. Berry and K. Morrison.	**▲COURT USE ONLY▲**
Attorneys for Petitioners: Mark G. Grueskin, #14621 Nathan A. Bruggeman, #39621 David M. Beller, #35767 **Recht Kornfeld, P.C.** 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile)	Case Number: 2024SA63

PETITIONER'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

X It contains 3,317 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

Initiative 2023-2024 #142 requires all persons who have dealings with a public school to act as informants to parents and others about students' gender identity issues. This measure specifically requires teachers, nurses, volunteers, and anyone "associated with a public school" to relate information about a child's experience with any difference between that child's biological sex and his or her "perceived or desired gender." This information has to be transmitted to every person who has legal custody of a child, and that list is much more extensive than what is stated in the titles ("parents and legal guardians").

This ballot title challenge addresses only the clear title of Initiative #142. Petitioner here sought before the Title Board and now seeks from this Court modification of the ballot titles so voters know: (1) the test for who has to be informed is not, as the titles state, whether a person is a parent or legal guardian but is, instead, whether a person has legal custody of a child; and (2) the audience receiving this information is not just one person or even the adults caring for the student at the current time but is, instead, all the individuals and entities that are defined as "parents" under #142.

These are not mere details of the measure. The requested clarifications are critical so that voters know how extensive this new system of reporting on students' gender identity will become, should this measure pass. And that matter is not just a central feature of the initiative; it's *the* central feature of the Initiative #142.

ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred by stating that Initiative #142's mandated notification of a child's possible gender incongruence is limited to "the parents or legal guardians" of that child, when the measure itself requires much broader notice—to any entity or person that has "legal custody" of a child?

2. Whether the Title Board erred by misrepresenting that this notice can be given to a child's "parents or legal guardians" when the measure requires it be given to all "parents," defined as natural parents, adoptive parents, legal guardians, *as well as* any other entity or person having "legal custody" of a child?

STATEMENT OF THE CASE

A. Statement of Facts.

Lori Gimelshteyn and Erin Lee (hereafter "Proponents") proposed Initiative 2023-2024 #142 ("#142" or "Proposed Initiative"). Representatives of the Colorado Legislative Council and Office of Legislative Legal Services participated in review and comment hearings as required by C.R.S. §1-40-105(1). Record "R." at 41.

Proponents gave the final version of the Proposed Initiative to the Secretary of State for submission to the Title Board on January 26, 2024. R. at 3.

Initiative #142 creates mandatory reporting in all public schools about students "experiencing gender incongruence," defined as "a difference between a child's biological sex and the child's perceived or desired gender." Proposed Section 22-1-144(1)(b), (2). The newly anointed reporting personnel are "public school representatives," defined to mean school staff, teachers, contractors, volunteers, and "any other person associated with public schools." Proposed Section 22-1-144(1)(e). In other words, every parent and every student (as persons who are associated with public schools) would be required to provide notice of any student experiencing gender identity issues in any public school. That notification must be provided, within forty-eight hours of receiving such information, to "the child's parents." Proposed Section 22-1-144(2). A "parent" is anyone "who has legal custody of a child." Proposed Section 22-1-144(1)(c).

B. Nature of the Case; Course of Proceedings, and Disposition Below.

The Title Board held a hearing on February 7, 2024, at which time the board approved a single subject and set a title. R. at 5. On February 14, 2024, Petitioner Mary Elizabeth Childs filed a Motion for Rehearing, alleging that a title

was set for Initiative #142, contrary to the requirements of Colo. Const. art. V, sec. 1(5.5), and that the Title Board set a title that is misleading and confusing and does not fairly communicate the intent and meaning of the measure. R. at 9-15.

The Title Board conducted a rehearing on February 21, 2024, and granted certain of Petitioner's requests to correct the title and rejected others.[1] R. at 7. The Board's amended ballot title and submission clause reads as follows:

> *Shall there be an amendment to the Colorado Revised Statutes requiring any person associated with any school to notify the parents or legal guardians that their child is experiencing gender incongruence, and, in connection therewith, requiring such notice to be provided within 48 hours of receiving any information that a child is experiencing gender incongruence defined as a difference between a child's biological sex and the child's perceived or desired gender; applying the notification requirement to any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school regarding any child enrolled at any public, private, or parochial preschool, primary, or secondary school that receives state or federal funding?*

R. at 7.

---

[1]An audio recording of the rehearing on #142 ("Hearing Recording") is available at https://csos.granicus.com/player/clip/432?view_id=1&redirect=true

C. Jurisdiction

Petitioner is entitled to review before this Court under C.R.S. §1-40-107(2). Petitioner timely filed the Motion for Rehearing with the Title Board. *See* C.R.S. §1-40-107(1). R. 9-15. Additionally, Petitioner timely filed her Petition for Review seven days from the date of the Title Board's rehearing. C.R.S. §1-40-107(2).

SUMMARY OF ARGUMENT

Proposed Initiative #142 creates notification requirements that have nothing to do with traditional school reporting back to parents by persons who don't typically report back to parents. This measure mandates that anyone who has anything to do with a school and who learns of a child's gender incongruence provide that information to all persons and entities that fall within the definition of "parent."

That definition is so expansive as to require that all persons, agencies, or entities with legal custody of a child to receive notice. But the title misrepresents this key provision by short-handing the language of the measure and instead, advises voters only that "parents or legal guardians" receive notice. And it fails to communicate that the measure requires notice to all "parents" without limitation. Thus, every person or entity that qualifies under that definition must get notice of this personal, sensitive information.

This is a far-reaching, unprecedented measure. Voters should know how far it goes before they agree to create this new obligation. The title should be returned to the Title Board for correction.

LEGAL ARGUMENT

I. The ballot title is misleading because it fails to inform voters that persons and entities that have "legal custody" of a child must be notified of any indication of the child's gender incongruence.

A. Preservation of issue; standard of review.

This topic was addressed specifically in the Motion for Rehearing, filed with the Title Board. R. at 13.

The Title Board has discretion to frame a proposed ballot measure, but the ballot title must still "fairly summarize the central points" of the proposed measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin.,* 877 P.2d 311, 315 (Colo. 1994). The titles must unambiguously state the principle of the provision sought to be added, amended, or repealed. C.R.S. §1-40-106(3)(b); *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #215*, 3 P.3d 11, 14 (Colo. 2000) ("*#215*").

The Title Board's primary objective is to "fairly reflect" an initiative "so that voters will not be misled to vote for or against the proposed initiative merely by virtue of the particular words employed by the Title Board." *Id.* Where the Board's

chosen title verbiage would lead voters to believe that the measure will apply in ways that do not reflect the express language of the initiative text, the Board errs, and the title must be returned to it for correction. *Id.* at 16.

B. The title's reference to "parents or legal guardians" of a child is an incorrect, incomplete, and inaccurate reflection of "parent" which is a defined term in Initiative #142.

The single subject statement in the title states that #142 requires "…any person associated with any school to notify the parents or legal guardians that their child is experiencing gender incongruence..." R. at 7. About an initiative's single subject statement, the law is clear. The initiative's single subject must "be clearly expressed" in the title. Colo. Const., art. V, § 1(5.5); C.R.S. § 1-40-106.5(1)(a). This single subject statement falls short of that standard.

The Proposed Initiative defines "parent" as "a person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian." Proposed Section 22-1-144(1)(c). The measure's overarching standard for the person entitled to notice about a child's gender identity is any person or any entity that "has legal custody of a child."

The "including" phrase, listing "a natural parent, adoptive parent, or legal guardian," signifies that the stated examples fall within the broader category

(persons that have legal custody of a child) that introduces them. "[T]he term 'include' is ordinarily a word of extension or enlargement, rather than a term of limitation." *Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990) (citation and internal quotation marks omitted). Voter understanding of an initiative is geared to what a word or phrase ordinarily means. *In re Title, Ballot Title and Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶9, 328 P.3d 172, 176 (in a clear title analysis, Court will give words and phrases their plain and ordinary meaning); *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶20, 269 P.3d 1248, 1253-54 (voter intent is a function of the ordinary and popular meaning of words used in an initiative) (citation omitted)).

The Board took a clearly stated standard from the initiative ("a person who has legal custody of a child") and used inaccurate shorthand ("parents or legal guardians") instead. As the Motion for Rehearing alleged, *see* R. at 13, there are many legal custodians of children who are not parents or legal guardians:

- A "grandparent, or other suitable person" may be awarded legal custody of a child or youth. C.R.S. §19-3-508 (1)(b); *see In re Marriage of Bergeson-Flanders*, 509 P.2d 1083, 1087 (Colo. App. 2022) ("maternal grandmother voluntarily accepted legal custody of the child in a dependency and neglect case and has never sought permanent custody").

- A "child placement agency for placement in a foster care home or other child care facility" may be awarded legal custody of a child. C.R.S. §19-3-508 (1)(c).

- A court may enter "an order awarding legal custody of a child or youth to the department of human services or to a county department" of human or social services. C.R.S. §19-1-115(6); *see People in the Interest of D.*, 580 P.2d 836, 838 (Colo. App. 1978) ("a public agency can be forced to accept legal custody of a child and assume the responsibilities enunciated" in statute).

- A "psychological parent" may obtain legal custody by filing an action without the consent of either of the child's natural parents for allocation of parental responsibility. *In re A.C.H.*, 2019 COA 43, ¶1; *see* C.R.S. §14-10-123(1)(b).

To the extent that the Title Board conflated "legal custody" with the status of being a "legal guardian," it erred. Colorado law does not treat these two terms as being synonymous. In fact, statutes recognize that parents, legal guardians, and legal custodians are distinct actors vis-à-vis decisions to be made that affect a child. *See, e.g.*, C.R.S. §§ 19-1-104 (6)(a)(II) (listing separately parents, legal guardians, and legal custodians who have, or lack, adjudications regarding child custody); 22-33-106(1)(c.5)(III) (allowing school discipline when notice is provided to "the parent, legal guardian, or legal custodian" of a student); 25-40-704(d)(2.5)(a), (b), (d)(I), (II) (acknowledging roles of a "parent, legal guardian, or person vested with legal custody of a minor or decision-making responsibility for medical care of a minor, or other adult person responsible for the care of a minor"). The courts

likewise recognize this distinction. *See Ansel v. State Dep't of Hum. Servs*., 2020 COA 172M, ¶¶ 19-23, 480 P.3d 758, 764 (childcare provider "was neither the child's parent or guardian, nor his legal custodian").

Where titles misrepresent the applicability of key provisions of an initiative, the titles are misleading. In *#215, supra*, a proposed ballot measure allowed expansion of mines operating under existing permits, but it prohibited modification of permits in order to allow expansion of the mines. 3 P.3d at 16. The titles set for this measure misinformed voters that the measure restricted any expansion of mines. This misstatement of the scope of the initiative made the titles "misleading and inaccurate." *Id.*

The same is true here. The text of Initiative #142 requires notification to any entity and any individual that has "legal custody" of a child. The title of Initiative #142 communicates to voters that this category is limited to "parents or legal guardians." The category of persons having "legal custody" is broader than that. Voters should know, for instance, that the title doesn't do justice to the measure, given the breadth of the definition of "parent." For instance, a county social services department or a child placement agency would be required to receive notice, as both have the duties that come as a result of having legal custody of a child without being

either a parent or a legal guardian. The same can be said of other persons or entities who happen to have "legal custody" of a child but without the status of being a "legal guardian."

A challenge to the clarity of a ballot title, based on "the scope of the initiative," generally will be unsuccessful where the titles "track the language of the proposed initiative." *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 # 73*, 135 P.3d 736, 740 (Colo. 2006). Here, however, the titles depart from the initiative text by too narrowly describing the group of persons to whom notice must be provided. That departure leaves in its wake a gap in voter understanding about the initiative.

Thus, the Title Board erred by using under-inclusive language to describe persons who would play a pivotal role in this initiative—namely, the receptors of mandatory information about their child's gender identity. Provision of this notice is ***the*** central aspect of this measure, and the Title Board needed to describe it accurately. It failed to do so, and the titles should be corrected.

II. The title is misleading because it fails to inform voters that all persons or entities that meet the definition of "parent" must be given the notice required by #142.

A. Preservation of issue; standard of review.

This argument was preserved below. R. at 13.

The standard of review is, again, whether the title set is clearly misleading. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #246(e)*, 8 P.3d 1194, 1197 (Colo. 2000). The Court "will not affirm the setting of titles when a material omission therefrom would mislead the voters or promote voter confusion." *Id.*

A legally compliant ballot title must contain sufficient information to enable the electorate to "determine intelligently whether to support or oppose such a proposal." *In the Matter of the Proposed Initiative on Parental Notification*, 794 P.2d 238, 242 (Colo. 1992). This standard must be met to serve the needs of voters, "whether familiar or unfamiliar with the subject matter of a particular proposal." *Id.*

B. The titles fail to state that all persons who have legal custody of a child must be notified of a child's gender identity issues.

Proposed Section 22-1-144(2) provides for notification by anyone "associated with" a school. "Any public school representative who obtains information that a child enrolled in their public school is experiencing gender incongruence shall notify

the child's parents within forty-eight hours of receiving such information." (Emphasis added.) The notification cannot simply be provided to one parent. The proponents of #142 used the plural ("parents"), meaning that any government department, child placement agency, or individual that has legal custody of a child must be informed. *See People v. Weiss*, 133 P.3d 1180, 1187 (Colo. 2006) (where General Assembly uses plural to describe term, the plain, ordinary meaning of the term as a plural noun is given effect).

In fact, this use of the plural of "parent" establishes a real and foreseeable potential for controversy if this measure is adopted. For example, In *Sidman v. Sidman*, 249 P.3d 775, 783 (Colo. 2011), the child's parents voluntarily consented to the appointment of a guardian for their child. In that situation, the guardian, not the parents, were responsible for the "care, custody and control of the child," and the "parents' authority over day-to-day decisions affecting the child [was] suspended in favor of the guardian's decisions." *Id.*; *see* C.R.S. § 15-15-204(2)(a).

Situations comparable to the one presented in *Sidman* are foreseeable under Initiative #142. There, the Court took note of the competing voices in that child's life and the potential that, with each of them desiring to be heard, "**the child would be faced with conflicting decisions**" from the various adults involved. 249 P.3d at

783. Conflicting decisions by those with parenting or custody rights can "compromise the welfare of the child." *People ex rel. E.S.*, 49 P.3d 1221, 1223 (Colo. App. 2002).

The title's failure to inform voters that this notification must be provided to every person that has "parent" status in this initiative was error. The titles should have relayed that the notification must be given to "all individuals and governmental or private agencies having legal custody of a child" or "to any person that has legal custody of a child" or some equivalent wording. Voters should know they are considering a notification that is to be transmitted to all persons having a particular status within the definition of "parent" (natural parent, adoptive parent, or legal guardian).

The prospect of conflicts between two divorced parents, or between a natural parent and an adoptive parent, or between a grandparent and a psychological parent, or between a parent and a legal guardian, is real. Voters should know of the potential disruption to the child from conflicting decisions by these individuals.

This information is needed in the title, not only to disclose that persons or entities with inconsistent interests and levels of involvement with a child must be notified of gender identity matters. It also is necessary to inform voters of the burden

placed on every "school representative," defined as anyone associated with a school in whatever manner. "'Public school representative means' any public school administrator, teacher, nurse, contractor, volunteer, **or any other person associated with public schools**." Proposed Section 22-1-144(1)(e) (emphasis added); *see also* R. at 10-11 (motion for rehearing's discussion of the broad scope of this language). A public school representative would have a substantial task to divine all of the persons who were required to receive the notification, how to locate them for purposes of this communication, and then actually provide the notice. The extent of transmitting otherwise private information is certainly among #142's "central features."

Like *#215, supra*, this title diverges substantively from the text of the initiative. It misrepresents the universe of people or entities that are required to receive the mandated notification. In *#215*, the ballot title overstated what the ballot measure actually did. Here, the ballot title understates what this initiative will actually do. But the result is the same: voters will not know who is most affected by this requirement. Because that failure will lead to a misunderstanding about the reach of this measure, the titles are legally deficient. Therefore, the Title Board should remedy this error.

CONCLUSION

The Title Board erred. This Court needs to step in so that the flaws in this title surface on the face of initiative petitions and the November ballot. It should reverse the decision of the Title Board, declare the title deficient, and remand with directions to the Title Board to revise the title for #142 accordingly.

Respectfully submitted this 19th day of March, 2024.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
David M. Beller, #35767
Nathan Bruggeman, #39621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
mark@rklawpc.com
david@rklawpc.com
nate@rklawpc.com
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, March 19, 2024, to the following:

Counsel for the Title Board:
Michael Kotlarczyk
Kyle M. Holter
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

And via FedEx Overnight Delivery to:

Lori Gimelshteyn
26463 East Caley Drive
Aurora, CO 80016

And

Erin Lee
6787 Hayfield St.
Wellington, CO 80549

/s Erin Mohr